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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Policies and Rules for the	)	IB Docket No. 98-21
Direct Broadcast Satellite Service	)	

COMMENTS OF DIRECTV, INC.

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DIRECTV, Inc. ("DIRECTV")[1] hereby submits the following comments in response to the Commission's Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

There can be little dispute that the DBS industry is presently experiencing a tremendous period of growth as the most promising multichannel video programming distributor ("MVPD") competitor to incumbent cable television systems. In just four years of operation, DIRECTV, as the nation's leading DBS service provider, has attracted a customer base of more than 3.5 million subscribers. Although this figure remains modest relative to the tens of million

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1 DIRECTV is a wholly-owned subsidiary of DIRECTV Enterprises, Inc., a licensee in the DBS service and wholly-owned subsidiary of Hughes Electronics Corporation.

of cable television subscribers across the U.S.,[2] DBS has grown into the "most significant alternative to cable television."[3]

As the Commission considers changes to the U.S. DBS regulatory regime, DIRECTV urges the Commission to continue the flexibility that has been a hallmark of the agency's approach to DBS regulation, and a direct cause of the industry's current bright future in offering more choice to U.S. consumers in the MVPD marketplace. When the Commission first proposed rules for DBS in 1981, it specifically stated that it was seeking to apply an "open and flexible approach" to regulating DBS to "allow the business judgments of individual applicants to shape the character of the service offered."[4] Later, when the Commission adopted interim DBS rules, the Commission reiterated its intention to take a flexible regulatory approach and "to impose as few rules as possible."[5] In fact, the Commission has consistently encouraged DBS

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2 Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 97-141, *Fourth Annual Report* (rel. Jan. 13, 1998) ("*1997 Competition Report*"), at ¶ 11.

3 *Id.* As of June, 1997, cable television had 64.2 million of the overall 73.6 million MVPD subscribers. *Id.* at ¶¶ 11, 15. By contrast the FCC estimated the number of DBS and medium-power DTH subscribers to be approximately 5.1 million.

4 Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference, Gen. Docket No. 80-603, 86 FCC 2d 719, 750 (1981).

5 Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference, Gen. Docket No. 80-603, 90 FCC 2d 676, 684 (1982).

development through flexible regulation in order "to promote effective competition to the service provided by cable systems."[6]

DIRECTV urges the Commission to continue this responsive approach. While DBS services have recorded dramatic subscriber growth over the past few years, the industry remains a long way from achieving a competitive position capable of eroding the market power of the dominant cable industry. Indeed, the ultimate structure of the DBS industry has yet to emerge. For the foreseeable future, unduly burdensome regulation could result in permanent damage to the industry that currently represents the strongest competitive threat to incumbent cable systems. The Commission therefore should continue the flexible regulatory approach that accounts for the rapidly-evolving nature of DBS service.

In the comments below, DIRECTV fully supports the Commission's overall objective in this proceeding -- streamlining and simplifying the Commission's rules governing DBS service. With respect to ownership issues, specifically the question of cable/DBS cross-ownership, DIRECTV believes that, at this time, the public interest generally will be best served by the Commission's continuing to analyze specific transactions on an *ad hoc*, case-by-case basis, rather than implementing *per se* restrictions. However, this does not mean that the policy predicate for a blanket cable/DBS cross-ownership rule is lacking. To the contrary, because of

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6 Revision of Rules and Policies for the Direct Broadcast Satellite Service, 11 FCC Rcd 9712 (1995) ("*DBS Auction Order*"), at ¶ 65 (sharing "many commenters' reluctance for regulation of the DBS service, which is why [the Commission] sought to implement the least intrusive rule possible to further the goals . . . of fostering competitive rivalry among MVPDs").

the market power of the incumbent cable industry, local MVPD markets remain "highly concentrated" and are still characterized by "barriers both to entry and expansion by competing distributors."[7] If the Commission is to avoid blanket prophylactic rules in addressing this market power, then it must be all the more vigorous in taking the regulatory actions necessary to preserve and promote competition in the MVPD industry. Specifically, the Commission should deny transactions -- such as the proposed assignment of the MCI authorization for the 110° W.L. orbital position to Primestar -- that threaten the development of independent, effective DBS competition to dominant cable operators.

With respect to geographic service and auction requirements, DIRECTV finds some of the Commission's proposed changes puzzling, and urges that they not be adopted. In particular, the Commission addressed the question of DBS geographic service obligations just two years ago, and at that time adopted reasonable measures that struck an appropriate balance between the important goals of promoting service to U.S. subscribers in Alaska and Hawaii, and the need to implement regulations that do not unduly constrain the development of DBS service. That policy balance -- and those rules -- should not be changed.

Finally, DIRECTV offers comment on the Commission's specific proposals governing the technical parameters and operation of DBS systems. Once again, these rules should be implemented with both maximum protection and flexibility for U.S. DBS systems in

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[7] *1997 Competition Report* at ¶ 11.

mind. The Commission should ensure that the DBS industry is able to continue the technical expansion and innovation that already has brought tremendous benefits to the American public.

II. ADMINISTRATIVE RULE CHANGES

DIRECTV supports the Commission's efforts to consolidate, where possible, the DBS service rules with the rules governing other satellite services.[8]

First, DIRECTV supports the Commission's proposal to relocate the DBS service rules from Part 100 to Part 25, provided that the rules continue to recognize the evolving nature of the DBS industry and the distinct technical, legal and regulatory constraints that the industry faces. Thus, DBS should continue to be defined as a specific service under Part 25, and DIRECTV agrees that the DBS definition should be clarified to reference the frequencies used by the DBS service in order to distinguish rules applicable to the DBS service from the rules for other Part 25 satellite services.[9]

DIRECTV also favors the Commission's proposed one-step licensing process, which will consolidate the existing three steps of the DBS licensing phase (grant of a construction permit, launch authorization, and licensing of space station facilities) into a single, more efficient application process.[10] This change will make the application process less burdensome for DBS applicants without hampering the public's ability to comment upon the

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8 *See Notice* at ¶¶ 13-17

9 *Id.* at ¶ 19.

10 *Id.* at ¶ 24.

proposed DBS systems. In addition, by allowing DBS providers to use the same forms and procedures as other satellite service providers, the Commission may facilitate the development of hybrid satellite systems that combine DBS-band satellite functions with those of other bands at the same or nearby orbital locations. A coordinated authorization process may help pave the way for complex multi-band, multi-service offerings to be brought expeditiously before the American viewing public.

III. OWNERSHIP ISSUES

A. Market Definition

As a threshold matter, DIRECTV believes that the MVPD product market and local geographic markets remain the proper relevant markets to assess transactions that affect the ownership of DBS frequencies.[11] As the *Notice* observes, these markets have been used for more than five years, including when the DBS rules were first re-examined in 1995 and most recently in the Commission's 1997 Competition Report.[12]

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11 *See Notice* at ¶¶ 60-65.

12 *Id.* at ¶¶ 60, 64; *see* 1997 Competition Report at ¶ 123; *DBS Auction Order* at ¶ 36; *see also Third Annual Report*, 12 FCC Rcd 4358, 4418, ¶ 115 (1996); *Second Annual Report,* 11 FCC Rcd 2060, 2122, ¶ 129 (1995); *First Annual Report*, 9 FCC Rcd 7442, 7467, ¶ 49 (1994); *cf. LMDS Second Report and Order* at ¶ 163 (examining cable company eligibility restrictions in context of MVPD market). The Commission has also noted that the MVPD market is "the relevant product market contemplated in the 1992 Cable Act." *First Annual Report*, 9 FCC Rcd at 7467, ¶ 49.

DIRECTV believes that these definitions usefully describe the competitive environment in which DIRECTV and other MVPDs compete. They should continue to be used in assessing the competitive effects of particular transactions.

B. Cable/DBS Cross-Ownership

The *Notice* has posed a number of questions regarding the possible implementation of a blanket cable/DBS cross-ownership restriction.[13] Although the theoretical and factual underpinnings for the imposition of such a ban clearly exist in today's MVPD market, DIRECTV believes that an outright restriction can be avoided, provided that the Commission vigorously reviews, and if necessary, conditions its approval of or blocks altogether, particular transactions that pose a threat to the development of effective competition in the MVPD market and an aggressive, cable-competitive DBS industry.

Initially, there is no question that the policy predicate for a cable/DBS cross-ownership restriction exists. As the Commission has recognized, incumbent franchised cable operators control 87% of the MVPD market,[14] and continue to be the dominant distributors of multichannel video programming.[15] Local markets for the delivery of video programming remain highly concentrated, as these entrenched providers continue to erect or sustain "barriers to

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13 *Notice* at ¶¶ 54-65.

14 *Id.* at ¶ 54 (*citing 1997 Competition Report* at Appendix E, Table E-1).

15 *Id.* (*citing 1997 Competition Report* at ¶ 11).

both entry and expansion by competing distributors,"[16] and average monthly cable television rates have increased sharply over the last year, at a rate of 8.5 percent.[17]

Given these findings, the Commission would be justified in using an ownership restriction to curb the ability of cable interests to acquire preemptively DBS resources in order to blunt competition to their franchised cable operations. Indeed, the Commission recently used this precise rationale to impose a restriction prohibiting incumbent cable operators from acquiring Local Multipoint Distribution Service ("LMDS") licenses in the geographic markets in which they also own cable systems. In so doing, the Commission invoked the concerns that led the Department of Justice and forty State Attorneys General in the early 1990's to investigate the motives and conduct of the nation's largest cable multiple system operators ("MSOs") in forming the Primestar DTH venture:

> The anticompetitive motives and behavior alleged to have been manifested by cable companies with respect to satellite broadcast service and addressed in the *Primestar Cases*, are similar to the motives and behavior that we anticipate with respect to incumbent entry into LMDS and are attempting to address here:
>
> - The acquisition of licenses in order to forestall market entry by, and consequent competition from, a new competitor.
>
> - The loss of a valuable opportunity to introduce competition into concentrated markets characterized by firms with substantial market power.[18]

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16 *1997 Competition Report* at ¶ 11.

17 *Id.*

18 Rulemaking to Amend Parts 1, 2, 21 and 25 Of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band,

The Commission found that cable companies in approaching LMDS -- like DBS a new, potentially formidable cable-competitive service -- had the perverse incentive "to protect their market power and preserve a stream of future profits."[19] Thus, in the interest of promoting MVPD competition, the Commission imposed a blanket restriction limiting cable company eligibility for in-region LMDS licenses.

In this proceeding, the question is whether the Commission's continued resolve to promote MVPD competition warrants similar prescriptive action with respect to the DBS service. Congress considered imposing a cable/DBS cross-ownership ban in 1992, before any DBS system was yet operational, but ultimately decided that such legislative action was premature. Instead, Congress specifically called upon the Commission to "exercise its existing authority to adopt such limitations should it be determined that such limitations would serve the public interest."[20]

In this regard, from a public interest standpoint, there certainly are good reasons to believe that entrenched cable interests will not have incentives that are equivalent to independent DBS operators to maximize DBS subscribership and competitiveness with cable operations in the MVPD marketplace. Indeed, the principal case that has engendered much of

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To Establish Rules and Policies for Local Multipoint Distribution Service And For Fixed Satellite Services, CC Docket No. 92-297, *Second Report and Order* (released Mar. 13, 1997) ("LMDS Second Report and Order"), at ¶ 169, *aff'd, Melcher v. FCC*, 134 F.3d 1143 (D.C. Cir. 1998).

19 *Id.* at ¶ 171.

20 H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 82 (1992); *see DBS Auction Order* at ¶ 27.

the discussion of the need for a cable/DBS cross-ownership restriction is the pending application of MCI to assign its DBS interests at the 110° W.L. orbital position -- one of only three locations capable of serving the full continental United States ("CONUS") -- to Primestar, the satellite DTH entity that is controlled by the nation's largest cable MSOs. As Dr. Carl Shapiro of the University of California at Berkeley has observed in connection with that assignment:

> [P]ermitting cable operators to control one of only three full-CONUS orbital slots will prematurely and significantly reduce the number of routes by which cable operators can be attacked. DBS is still in its infancy. I cannot tell you today just how the technology will evolve, how important video-on-demand will become, what programming will be offered by DBS operators, or how deep will be the inroads that DBS makes into the cable subscriber base. No one can, and that's the point. In the presence of so much uncertainty, the public interest calls for preserving the independence of scarce assets that can be used to erode cable's market power.[21]

As set forth in DIRECTV's filings made in connection with the proposed MCI-Primestar transaction, the Commission should deny that proposed assignment in order to prevent the national distribution potential of DBS spectrum at one of the prime DBS orbital locations from falling into the hands of a conglomerate comprised of the nation's largest cable incumbents.[22] These entities have incentives to see DBS develop as a complement to, rather than

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21 In the Matter of MCI Telecommunications Corp. and Primestar LHC, Inc. for Consent to Assignment of Direct Broadcast Satellite Authorizations, File No. 106-SAT-AL-97, Petition to Deny of DIRECTV, Inc. (Sept. 25. 1997), Exhibit 1, Statement of Professor Carl Shapiro, September 24, 1997, at 2 ¶ 5.

22 Petition to Deny of DIRECTV, Inc. (Sept. 25, 1997); Reply of DIRECTV, Inc. (Oct. 20, 1997); Supplemental Response of DIRECTV, Inc. (Feb. 13, 1998).

a substitute for, their franchised cable operations, and a track record that suggests a real and substantial potential for anticompetitive conduct.[23]

Having said that, DIRECTV also believes that a *per se* cable/DBS cross-ownership ban is a harsh measure that generally is inconsistent with the flexibility that has characterized DBS service regulation. There may well be scenarios -- particularly as the MVPD market becomes more competitive -- where cable-DBS affiliations do not or will not pose the policy concerns that the Primestar assignment raises. If the Commission is vigorous in its monitoring and, if necessary, modification or prohibition of specific transactions, there is no need for the introduction of a blanket ownership prohibition.

C. Other Ownership Issues

The Commission also requests comment on a variety of other DBS ownership issues, *e.g.*, other transactions that might raise competitive concerns; whether full-CONUS DBS locations should be analyzed differently than other locations; or whether any entity, cable or non-cable affiliated, should be permitted to have interests at more than one full-CONUS location.[24]

DIRECTV believes that none of these questions can or should be pre-judged in a rulemaking proceeding, and instead should be analyzed on a case-by-case basis. Nevertheless,

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23 *See, e.g., United States v. Primestar Partners, L.P.*, No. 93-Civ-3913, Competitive Impact Statement, 58 Fed. Reg. 33,948, 33,949 (June 23, 1993) (Primestar's existence predicated upon the "threat of cable-competitive entry into medium or high-power DBS"); *see also State of New York v. Primestar Partners, L.P.*, Complaint, 93 Civ. No. 3868 (S.D.N.Y. June 9, 1993), at ¶¶ 51-62.

24 *Notice* at ¶ 63.

DIRECTV believes that MVPD market power should be a central factor in performing such analyses.

D. Capacity Leases

The Commission also inquires whether DBS leasing arrangements can or should pose competitive concerns.[25] The practice of capacity leasing alone does not distort the competitive environment. Indeed, to the extent that one goal of the Commission in this proceeding is the more consistent regulatory treatment of satellite-based services,[26] DIRECTV would note that transponder sales and long-term leases have long been deregulated,[27] and capacity leases are prevalent in the satellite industry today. Competitive concerns can arise, however, when a capacity lease rises to the level of a *de facto* transfer of control, in particular when such a lease is clearly intended to effectuate an "end run" around the Commission's traditional approval process because the transfer would not be approved if subjected to Commission scrutiny.

DBS authorizations are radio licenses awarded under Title III of the Communications Act. Section 310(d) of the Act mandates that any transfer of control of a radio

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25 *Id.* at ¶ 61.

26 *See id.* at ¶¶ 13, 15.

27 Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, *Report and Order*, 11 FCC Rcd 2429 (1996); Domestic Fixed-Satellite Transponder Sales, *Memorandum Opinion, Order and Authorization*, 90 FCC 2d 1238 (1982), *aff'd Wold Communications, Inc. v. FCC*, 735 F.2d 1465 (D.C. Cir. 1984).

authorization requires prior Commission approval. This rule applies not only to *de jure* transfers of control, but to *de facto* transfers of control as well.[28] The test includes every form of control, positive or negative, and can be triggered where a party exercises a significant degree of management or financial control of the licensee.[29] The Commission typically examines various factors to determine whether, based on the totality of the circumstances, an unauthorized transfer of control has occurred.[30]

The lease of all of the capacity on a particular satellite can raise control concerns if that lease is joined with other circumstances that suggest that a party other than the licensee in actuality is making the fundamental decisions regarding the authorized satellites.[31] Such factors

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28 *Id.*

29 *See Metromedia, Inc.*, 98 FCC 2d 300, 303 (1984).

30 In evaluating whether an unauthorized transfer of control has occurred, the Commission often looks to the factors articulated in *Intermountain Microwave*, 24 Rad. Reg. (P&F) 983 (1963). These factors include: (1) whether the licensee has unfettered use of all facilities and equipment; (2) who controls daily operations; (3) who determines and carries out policy decisions; including preparing and filing applications with the Commission; (4) who is in charge of employment, supervision, and dismissal of personnel; (5) who is in charge of the payment of financial obligations, including expenses arising out of operating; and (6) who receives money and profits from the operation of facilities. *See* Volunteers in Technical Assistance, *Order*, 12 FCC Rcd 3094, at ¶ 24 (Int'l Bur. 1997) ("VITA II"); *cf. WHDH, Inc.*, 17 FCC 2d 856 (1969), *aff'd sub nom. Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (in ascertaining whether a transfer of control has occurred, the Commission traditionally looks beyond legal title to actions reflecting an unlicensed entity's right to determine the basic policies and ultimate control of the business).

31 *See* Advanced Communications Corp., *Memorandum Opinion and Order*, 11 FCC Rcd 3399, at ¶ 41 (1995); *see also In the Matter of Continental Satellite Corporation Request for Declaratory Ruling*, 11 FCC Rcd 5395 (Int. Bur. 1996) (finding that DBS capacity

might include that the lessee of 100% of the capacity of a particular satellite, for example, also has financed that satellite's construction; that the lessee has an option to purchase the satellite outright; or that the lessee controls all of the fundamental decisions about how the satellite will be used and operated. Such control concerns obviously would be most acute when the Commission has evidence that a particular lease transaction is designed to effectuate the same economics or end result as an outright transfer of a satellite authorization that would raise competitive or other public interest concerns if subjected to Commission scrutiny.[32]

In short, a 100% capacity lease can be one factor in an analysis that could suggest that an unauthorized transfer of control of a satellite authorization has occurred. However, it is not dispositive of the question. The Commission's inquiry instead should be focused on whether

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lease agreement, if executed and implemented, "would result in an unauthorized transfer of control of CSC's DBS permit . . . in violation of Section 310(d)").

32 DIRECTV notes in this regard that Primestar and TSAT recently have announced plans to engage in just such a transaction in order to "avoid[] the delay" associated with Commission review of Primestar's plans to provide high power DBS service. The parties have entered into a series of agreements designed to achieve the same economics and result as an outright transfer of Tempo's DBS authorization (currently controlled by TSAT) to Primestar to use eleven full-CONUS DBS frequencies at the 119° W.L. location. *See* Amendment to Registration Statement (Form S-4) of Primestar, Inc. ("Primestar S-4 Amendment"), filed with the Securities and Exchange Commission on February 9, 1998, at 56. Primestar and TSAT appear through these agreements to have effected a *de facto* transfer of control of Tempo's DBS authorization. *See* Satellite Business News, *Primestar Prepares 119-Degree Launch,* (April 3, 1998) (announcing Primestar's plans to offer 120 video and audio channels "from the Tempo-2 satellite at the 119-degree DBS orbital slot" to subscribers on a test basis in Dallas, TX and Charlotte, NC beginning on April 17, 1998); *Communications Daily* (April 2, 1998) (same); *cf. Advanced.,* 11 FCC Rcd. 3399 (1995), at ¶ 41 (capacity purchase agreement could not be "fairly characterized . . . as an arrangement by ACC for the launch, deployment, and operation of its own satellite system").

the *totality* of the circumstances show that a prohibited transfer has occurred, including whether the transaction is designed to accomplish indirectly an end result that Commission consideration of a proposed *de jure* transfer might otherwise prohibit.

IV. LICENSING ISSUES

A. Geographic Service Rules

1. Alaska and Hawaii

The Commission struck a delicate balance in 1995 when it adopted DBS geographic service requirements. In order to stimulate service to Alaska and Hawaii without unduly constraining the development and proliferation of the emerging DBS service, the Commission required DBS operators receiving authorizations after January 19, 1996 to provide service to Alaska and Hawaii upon commencement of operations, where such service is "technically feasible."[33] For existing DBS permittees and licensees, the Commission required DBS operators to "[p]rovide DBS service to Alaska and Hawaii from one or more orbital locations before the expiration of their current authorizations" or relinquish their western channel assignments.[34]

The *Notice* proposes, for licensees that were granted authorizations prior to January 19, 1996 (such as DIRECTV), to eliminate the rule tying geographic service to Alaska

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33 47 C.F.R. § 100.53(b).

34 *See* 47 C.F.R. § 100.53(a)(1)-(2). In the *Notice,* the Commission without explanation inaccurately characterizes DIRECTV's authorization to use twenty-seven channels at the 157° W.L. orbital position as "expired." *See* Table, "DBS Orbital Channels by Orbital Location," *Notice* at ¶ 9. That mistake should be corrected.

and Hawaii to retention of these licensees' western orbital locations. Instead, the *Notice* proposes to extend the Alaska/Hawaii geographic service requirement to pre-January 19, 1996 licensees who request either extensions of the expiration date for their authorizations or renewal of their licenses.[35] Other than incorporating Section 100.53 in its entirety into Part 25, DIRECTV sees no need for revisions to the current geographic service rules.

First, an expansion of geographic service requirements for existing, pre-January 19, 1996 licensees is feasible only in instances where such licensees are operating satellites that actually have the capability of serving Alaska and Hawaii. In DIRECTV's case, for example, two of its three satellites at 101° W.L. have five-year authorizations (granted before the license term for non-broadcast DBS services was changed to ten years in the 1995 *DBS Auction Order*) that expire in the years 1999 and 2000, respectively. These satellites today serve large portions of the Alaskan population, but cannot serve Hawaii.[36] That fact will not change when DIRECTV requests extension or renewal of its satellite authorizations in the next two years; DIRECTV likely will simply request an extended authorization to cover its existing satellites. Thus, a condition that would require such service would almost immediately place "the only operational

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35 *See id.* at ¶ 33.

36 DIRECTV's current DBS satellites do not transmit enough power in the direction of Alaska or Hawaii to provide service to 45 cm antennas. DIRECTV subscribers in major portions of Alaska can receive the service using larger dishes because Alaska is close enough to Washington to benefit from CONUS coverage. Unfortunately, because of Hawaii's geographic location, there is not sufficient signal strength for the satellites to reach the Hawaiian islands, because they are not in close proximity to the CONUS coverage beam.

[DBS] systems in violation of [Commission] regulations"[37] in a manner that would make no technical or policy sense.[38]

It also is unclear why the Commission now has decided to second-guess its 1995 decision to tie pre-January 19, 1996 licensees' retention of their western authorizations to the provision of Alaska/Hawaii service. As a threshold matter, DIRECTV notes that the text of the rule is not "unclear" (as the Commission suggests)[39] in permitting DBS licensees operating at eastern orbital locations to maintain their western channel authorizations until the expiration of their 10-year eastern channel satellite authorizations. That is *precisely* what a plain reading of the rule states, and it is consistent with the Commission's intent in promulgating it. In 1995, the Commission set a reasonable standard for existing permittees to provide Alaska/Hawaii coverage, and refused to "adopt a rule that would immediately place the only operational systems in violation of [Commission] regulations."[40] Instead, the Commission deliberately gave existing DBS systems the flexibility to phase in Alaska and Hawaii service over time, with the possibility that they would lose their western channel assignments built into the rule as an added incentive to do so.

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37 *DBS Auction Order* at ¶ 127.

38 On the other hand, to the extent that DIRECTV one day will request authority to replace its satellites with next-generation satellite technology that may be capable of such service from 101° W.L., such a condition might be appropriate.

39 *Notice* at ¶ 35.

40 *DBS Auction Order* at ¶ 127.

The overall effect of the Commission's 1995 rules for new and existing permittees has been to facilitate service to Alaska and Hawaii. DBS providers currently serve Alaska, and service to Hawaii will soon materialize. For example, with necessary equipment modifications, DIRECTV presently serves both residential and commercial customers in Alaska from its eastern orbital location at 101° W.L. Moreover, DBS permittees approved post-January 19, 1996 (MCI, Echostar, and Tempo) have explicitly agreed to design and deploy systems capable of providing service to Alaska and Hawaii.[41]

To the extent that the Commission now is concerned that its rule encourages the "warehousing" of western locations,[42] that concern is misplaced. Licensees of western channel assignments currently have every incentive to deploy service at those locations as quickly as possible if a business plan can be found for those assignments that makes economic sense. Indeed, in DIRECTV's case, no party is in a better position than the nation's leading DBS operator to determine a use for its channel assignments at 157°. Attempting to reclaim western locations on the fragile and speculative hope that other parties in the marketplace may be willing to bid for them at auction[43] ignores the reality that these locations present difficult prospects for

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41 MCI Telecommunications Corporation, 11 FCC Rcd 16275 (1996); 12 FCC Rcd 12538 (1996); *see also* Echostar DBS Corporation, 12 FCC Rcd 11946 (1996); Loral Corporation Request for a Declaratory Ruling Concerning Section 310(b)(4) of the Communications Act of 1934, DA 97-725 (1997) (expecting R/L DBS Company to serve Alaska and Hawaii upon assignment of Continental Satellite Corporation's DBS construction permit).

42 *Notice* at ¶ 36.

43 *Id.*

economically sustainable service to U.S. subscribers given their coverage areas. While a party may bid a nominal price for a re-assigned western location, it simply does not follow that the prospects for service from these locations will materially improve once that occurs.

In any event, DIRECTV urges that the requirement of technical feasibility be retained in any new geographic service obligation adopted. The existing geographic service rule, requiring new (post-January 19, 1996) licensees to serve Alaska and Hawaii where technically feasible is a reasonable rule that facilitates the goal of providing service to these important geographic regions without unduly burdening existing licensees. In 1995, the Commission acknowledged DIRECTV's observation that the "technically feasible" qualification appropriately accounts for weight and power resources, the size of the receiving dish required, and technical limitations imposed by the Commission and the ITU. If the Commission makes any change to geographic service rules in this proceeding -- which DIRECTV would strongly discourage -- this qualification must be retained.

2. Service to Puerto Rico and other U.S. territories and possessions

The Commission also inquires whether geographic service requirements should extend to Puerto Rico and other U.S. territories and possessions. Again, while service to these areas is a desirable and important goal, DIRECTV believes that a rule requiring such service is unnecessary. As DBS service to the contiguous United States matures, and international satellite service entry barriers fall, DBS providers will naturally look to other geographic markets for expansion. Currently, for example, DIRECTV's affiliate, Galaxy Latin America, is actively

exploring service to Puerto Rico. Moreover, MCI, the licensee of twenty-eight 110° W.L. channels that Primestar seeks to acquire, has agreed to serve Puerto Rico through an extension of the shaped CONUS beam of its proposed DBS system.[44]

If the Commission is inclined to adopt geographic service rules for Puerto Rico, the U.S. Virgin Islands, or other U.S. territories or possessions, the rules should apply prospectively only to new DBS permittees or licensees where such service is technically feasible. Coverage of these areas may not be feasible or practical for existing DBS systems compared with the next generation of systems that likely will emerge.

* * * *

In sum, DIRECTV believes that the Commission's existing geographic service rules and naturally-occurring market forces have made significant progress toward the provision of full DBS service to the states of Alaska and Hawaii, as well as Puerto Rico and other U.S. territories. At the same time, these factors have allowed sufficient flexibility for DBS pioneers to focus on other imperative public interest concerns, such as developing high-quality product offerings capable of competing with cable and expediting the delivery of such services to market. The Commission therefore need not and should not rush to regulate further the geographic reach of the growing number of DBS providers. An "off-shore states" policy[45] is simply unnecessary, and may frustrate the inevitable global expansion of DBS service. While DIRECTV has always

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44 *See* MCI Telecommunications Corporation, 12 FCC Rcd 12538 (1996), at ¶ 2(a).

45 *See Notice* at ¶ 34.

supported the goal of including service to Alaska, Hawaii, and other U.S. territories, DIRECTV urges the Commission not to impose overly restrictive service conditions on the still-evolving DBS industry.

V. AUCTION RULES

The *Notice* takes a dramatic step by proposing to do away with DBS service-specific auction rules and to subject for the first time a satellite-based service to the FCC's revised Part 1 general auction rules ("General Auction Rules").[46] The Commission's first, and only, auctions of DBS channels arose from a special situation in which the Commission reclaimed channels from a DBS permittee that had blatantly failed to meet its construction milestones. In that particular situation, the Commission selected an auction mechanism primarily to re-deploy the orbit-spectrum resource in a rapid and efficient manner. DIRECTV supported the use of an auction in that particular circumstance (not expecting at the time, of course, that the Commission would effectively preclude DIRECTV from participating). The Commission's proposal to apply its uniform General Auction Rules to the DBS service represents a significant conceptual leap.

DIRECTV does not support the Commission's proposal to adopt auctions as a wholesale approach to DBS satellite licensing when mutually exclusive applications are filed. Auctions are one of several alternative licensing mechanisms at the Commission's disposal, and are not necessarily appropriate in all contexts. Moreover, the Commission has been careful to

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46 *Id.* at ¶ 37.

acknowledge "different and very complex" issues raised with respect to the use of auctions in the satellite arena.[47]

DIRECTV disputes the implication in the *Notice* that auctions should be used for all future DBS licensing. In addition, any such use of auctions in connection with future allocations of DBS frequencies should not "stand[] for the proposition that their use in other satellite services would also be appropriate."[48] The satellite industry has pointed out that satellite services are uniquely and inherently international, and satellite operators are compelled to deal with multiple governments and regulatory authorities to fully utilize their systems.[49] If auctions are adopted generally to assign satellite operating rights in the United States, the effects will likely "spill over" into the international community, with severely detrimental effects:

> The spillover will harm consumers by creating incentives to restrict output and by creating institutions that will delay decisionmaking and could impose incalculable costs. Further, international auctions can be expected to transfer wealth from U.S. taxpayers and investors to governments in other nations. There are other options available to the FCC for licensing satellite systems that have substantial benefits and avoid the risks created by auctions.[50]

Thus, the Commission should not use this proceeding to apply its General Auction Rules to all satellite services.

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47 *DBS Auction Order* at ¶ 151.

48 *Id.*

49 *See generally* Strategic Policy Research, *Public Harms Unique to Satellite Spectrum Auctions* (Mar. 18, 1996), *submitted by* Satellite Industry Ass'n, WT Docket No. 97-150 (Aug. 1, 1997).

50 *Id.* at 32.

VI. TECHNICAL ISSUES

The *Notice* raises a number of issues with respect to updating the technical rules for DBS service. DIRECTV offers the following comments on these issues referencing relevant paragraphs in the *Notice*:

- ¶ 43

The *Notice* proposes to create a new Section 25.146(f) that would require DBS licensees to operate in accordance with ITU regulations, which are codified in Appendices S30 and S30A of the ITU Radio Regulations. DIRECTV supports this proposed rule, which will ensure that U.S. and international positions with respect to BSS/DBS service proceed from a common baseline.

- ¶ 45

DIRECTV supports the Commission's proposal to delete the current provisions of Section 100.21 of its rules, which prohibit DBS providers from exceeding the technical limits in Annex 1 to Appendices S30 and S30A. The rule change will provide additional flexibility for the development of systems that may exceed Annex 1 technical limits, but that are nonetheless acceptable to affected administrations. There is no reason that the public should be denied the benefits of potentially innovative services in such a scenario.